File: A91 275 632 - Huntsville

Date: FEB 22 1999

In re: NEMORIO MARTINEZ a.k.a. Nemorio D. Ramirez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Charlotte K. Lang
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility

In an oral decision rendered on May 11, 1998, an Immigration Judge found the respondent to be subject to removal as charged, ineligible for any relief from removal due to a conviction for a drug-related aggravated felony, and ordered him removed to Mexico. The appeal will be dismissed.

The respondent admitted the allegations in the Notice to Appear (NTA) (Exh. 1) that he is not a citizen or national of the United States, he is a native and citizen of Mexico, he entered the United States without inspection on or about June 1980, he was subsequently granted temporary resident status pursuant to the legalization provisions of the Immigration and Nationality Act on November 1, 1989, and his status was thereafter adjusted to that of a permanent resident on December 7, 1990. Tr. at 31-32.

The record of conviction (Exh. 2), consisting of the indictment and of the judgment and properly considered by the Immigration Judge, establishes that on January 16, 1996, the respondent pleaded guilty to violation of section 481.126(a) of the Texas Health and Safety Code on August, 9, 1995, a first degree felony, by intentionally and knowingly financing and investing funds that he knew and believed were intended to further the commission of the offense of possession of a controlled substance, namely cocaine. See section 240(c)(3)(B) of the Act as enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-546, 3009-586 ("IIRIRA") (to be codified at 8 U.S.C. § 1229a(c)(3)(B)). The record of conviction reveals that he was sentenced to a term of imprisonment of 8 years.

The Immigration Judge erred by finding that the respondent's conviction constituted an aggravated felony. The term "aggravated felony" includes "illicit trafficking in a controlled substance (as described in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of Title 18, United States Code)." Section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B).

The term "drug trafficking crime" is further defined in 18 U.S.C. § 924(c)(2) as "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.) . . . ." Matter of Davis, 20 I&N Dec. 536, 538 (BIA 1992). "[A] state drug conviction could be considered a conviction for a 'drug trafficking crime,' and therefore an aggravated felony, if the underlying offense was analogous to a felony under the federal drug laws." Matter of L-G-, Interim Decision 3254 at 3 (BIA 1995). The respondent's conviction is for financing and investing funds to possess cocaine which is a felony under Texas law due to the length of the sentence. See TX Penal Code § 12.32; TX Health & Safety Code §§ 481.102, 48.115(a), 481.126(a)(2). "However, simple possession of more than 5 grams of a mixture or substance which contains 'cocaine base' is the sole offense under 21 U.S.C. § 844(a) that is punished as a felony" if the defendant has no prior drug convictions (emphasis in original). Matter of L-G-, supra. Since there is no evidence that the respondent financed and invested funds to possess cocaine base, or that he has any prior drug convictions, he was not convicted of a "drug trafficking crime" within the meaning of the Act since his crime is not analogous to a felony under federal drug laws. Id.

In addition, we have defined "illicit trafficking in a controlled substance" to include "any state . . . felony conviction involving the unlawful trading or dealing of any controlled substance as defined in section 102 of the Controlled Substance Act." Matter of Davis, supra, at 541. Cocaine is defined as a controlled substance under the Controlled Substances Act. See 21 U.S.C. § 812(c) (Schedule II). The record of conviction includes a police affidavit for an arrest warrant which indicates the respondent was arrested for attempting to purchase cocaine for sale. However, proof of a conviction is necessary to establish that the respondent is a deportable alien under section 237(a)(2)(A)(iii) of the Act. The police affidavit cannot be considered a part of the record of conviction for the purpose of determining whether he is a deportable alien. See Matter of Teixeira, Interim Decision 3273 (BIA 1996). The indictment and the judgment do not otherwise show that he was convicted of unlawful trading or dealing of cocaine.

However, we find that the Immigration Judge's error was harmless. There is clear and convincing evidence in the record to support the Immigration Judge's finding that the respondent is subject to removal as a deportable alien under section 237(a)(2)(B)(i) of the Act because he has been convicted of a violation of a law of a State relating to a controlled substance not involving the possession of a small amount of marijuana (emphasis added). There is no evidence of a direct appeal of his guilty plea, so the conviction is final for immigration purposes. See Matter of Gabryelsky, 20 I&N Dec. 750, 752 (BIA 1993).

Furthermore, the respondent is statutorily barred from applying for the applicable forms of relief under the charge of deportability sustained by the evidence. The respondent mentions in his appeal motion that he has been a resident of the United States for over 18 years during which he has worked and paid taxes and that he has to support his United States citizen wife and two children. However, due to his conviction, he is inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). He cannot waive this ground of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h).

In addition, in order to be eligible for cancellation of removal, the respondent must have resided in the United States continuously for 7 years after having been admitted in any status. Section 240A(a)(2) of the Act as enacted by IIRIRA § 304(a)(3), 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1229b(a)(1)). The term "admitted" is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Section 101(a)(13)(A) of the Act as enacted by IIRIRA § 301, 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1101(a)(13)(A)). For the purpose of determining eligibility for cancellation of removal, the required period of continuous residence or continuous physical presence shall be deemed to end when the alien has committed an offense referred to in section 212(a)(2) of the Act that renders him removable from the United States under section 237(a)(2) of the Act. Section 240A(d)(1) of the Act as enacted by IIRIRA § 304(a)(3), 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1229b(d)(1)).

The respondent admits that he entered the United States without inspection in June 1980. He became a temporary resident on November 1, 1989 under the legalization provisions of section 245A of the Act, 8 U.S.C. § 1255a. In order to do so, he had to establish that he had resided continuously in the United States in an unlawful status since January 1, 1982 and through the date his application was filed. Section 245A(a)(2)(A) of the Act; 8 C.F.R. § 245a.2(b) (1998). He has made no claim of legal entry prior to November 1, 1989. Therefore, he was not "admitted in any status" until November 1, 1989.

As previously noted, the offense for which the respondent was convicted is referred to in section 212(a)(2)(i)(II) of the Act. His period of continuous residence for the purpose of establishing eligibility for cancellation of removal under section 240A(a)(2) of the Act was stopped by the commission of an offense which made him removable under section 237(a)(2) of the Act. He committed the offense on December 9, 1995. He was convicted of the offense on January 7, 1996. Therefore, he is ineligible for cancellation of removal under section 240A(a)(2) of the Act because he cannot show that he has resided in the United States continuously for 7 years after having been admitted in a status on November 1, 1989.

Moreover, the Immigration Judge could not have granted the respondent voluntary departure in lieu of deportation. The respondent must have been a person of good moral character for at least 5 years preceding the application for voluntary departure. Section 240B(b)(1)(B) of the Act as enacted by IIRIRA § 1229c(b)(1)(B), 110 Stat. at 3009-586 (to be codified at 8 U.S.C. § 1229c(b)(1)(B)). However, any person convicted of an offense described in section 212(a)(2)(A) of the Act, except for the possession of a small amount of marijuana, shall not be found to be a person of good moral character during the period for which good moral character is required. Section 101(f)(3) of the Act, 8 U.S.C. § 1101(f)(3). Since the respondent's offense is describe in section 212(a)(2)(A) of the Act and was committed less than 5 years prior to the hearing, he was not eligible for voluntary departure.

The respondent has requested in his appeal that counsel be appointed to represent him. However, the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution applies only to criminal proceedings and not to removal proceedings. See Mantell v. INS, 798 F.2d 124, 127 (5th Cir. 1986). He has only a statutory and due process right to be provided an opportunity to obtain representation at no expense to the government. See id.; section 240(b)(4)(A) of the Act as enacted by IIRIRA § 304(a)(3), 110 Stat. at 3009-586

(to be codified at 8 U.S.C. § 1229a(b)(4)(A)). The Immigration Judge provided him with a list of free legal services during a master calendar hearing. Tr. at 4. Furthermore, we agree with the Immigration Judge that he provided him with sufficient time to obtain representation.

We note that the respondent has alleged in his appellate brief that he received ineffective assistance of counsel during his criminal trial. However, we cannot entertain his collateral attack on the conviction since the judgment does not appear to be void on its face. See Matter of Gabryelsky, supra; Matter of Fortis, 14 I&N Dec. 576, 577 (BIA 1974).

Therefore, we affirm the Immigration Judge's order to remove the respondent to Mexico. Accordingly, we enter the following order.

ORDER: The appeal is dismissed.

Lori Scialabba
FOR THE BOARD